

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

In the Matter of

CBS BROADCASTING, INC.

Employer^{1[1]}

and

JOSEPH ROGERS

Petitioner

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 1228,
AFL-CIO

Union

Case 1-RD-2066

DECISION AND DIRECTION OF ELECTION^{2[2]}

^{1[1]} The name of the Employer appears as amended at the hearing.

^{2[2]} Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Union is the certified bargaining representative of a bargaining unit composed of three maintenance employees employed by CBS Broadcasting, Inc. at its facility in Boston, Massachusetts. The Petitioner, Joseph Rogers, has filed a decertification petition in which he claims that a substantial number of employees assert that the Union is no longer their representative. The Union maintains that Rogers is a statutory supervisor who is not eligible to file a decertification petition and that the Petition should, therefore, be dismissed. CBS contends that Rogers is a nonsupervisory employee. I find that Rogers is a nonsupervisory employee. Therefore, I shall not dismiss the petition and shall direct an election in the certified unit.

BACKGROUND

The Union was certified in Case 1-RC-8821 as the representative of all maintenance department employees employed by the Employer at its studios located on Soldiers Field Road in Boston. The Union and CBS are parties to a collective-bargaining agreement effective from August 3, 2002 through August 2, 2005.

The bargaining unit is composed of crew chief/maintenance electrician Joseph Rogers, maintenance electrician Robert Pagliuca, and maintenance carpenter Peter Brooks. The three report to Building Supervisor Peter Sloane. Rogers has worked for CBS for nineteen years, the last four or five years as crew chief. Pagliuca has worked for CBS for about five or six years, and Brooks for about two years.

Rogers works from 7 a.m. to 3 p.m., Sunday through Thursday, Brooks works from 10 a.m. to 6 p.m., Tuesday through Saturday, and Pagliuca works from 8 a.m. to 4 p.m., Monday through Friday.

ROGERS' SUPERVISORY STATUS

The Union asserts that Rogers is a statutory supervisor on the ground that, as crew chief, he assigns work, responsibly directs employees, assigns overtime, and effectively recommends the hire of employees, and on the ground that he is paid a higher wage than the other maintenance employees and is responsible for the work of the department in the absence of the building supervisor.

Authority to assign work and overtime

The maintenance employees perform repairs to the building, including work such as maintaining generators and boilers. Rogers and Pagliuca also maintain electrical equipment, while Brooks does not do electrical work. The three are also responsible for shoveling and plowing snow.

Building Supervisor Sloane meets with the three maintenance workers every Tuesday. At the meeting, the maintenance workers tell Sloane what work they have already done and he tells them what to do for the rest of the week. Sloane prepares a punch list and modifies it if necessary. Rogers marks off each item on the list when it is

done, but he never changes any task on the list. If there is a question as to which employee should do a particular job, Sloane and the three maintenance employees talk it over.

Sloane is not physically present with the three maintenance workers as they work. He usually communicates with them by “Nextel” phone, which he usually leaves on 24 hours a day, seven days a week. Rogers helps determine the priority of assignments when Sloane is not around. Rogers testified that if something comes up, he tries to reach Sloane, but if he is unable to reach him, Rogers will make the decision, such as telling the two other maintenance workers to come in early or stay late to plow snow because of a storm. Rogers could think of only one instance, when Sloane was out of state, that he made the decision to keep the other two employees there late because of a storm coming.

Sloane determines whether the maintenance employees may earn overtime pay by staying late to complete a job. If the issue comes up before Rogers leaves for the day at 3 p.m., the other maintenance workers would probably go to Rogers first, because they all work in the same shop, but the decision is up to Sloane. There is no evidence as to how frequently the employees ordinarily work overtime.

Rogers testified that Brooks has been out on short-term disability. During his absence, Rogers and Pagliuca have been covering his shift on an overtime basis. Rogers testified that he and Pagliuca agreed to rotate working every other Saturday and to each work until 6 p.m. two days a week until Brooks returns.

Authority to grant time off

Sloane approves vacation requests, and Rogers plays no role in reviewing them. Sloane grants such requests on a first come/first served basis. When one of the maintenance workers needs a day off here or there, they might ask Rogers if he minds if they take the day off. He says it is all right with him and to check with Sloane. Rogers testified that he has never told Pagliuca or Brooks that he could not spare them. They usually work it out. Sloane, not Rogers, must arrange for someone to cover for an absent employee. The maintenance workers sometimes simply offer to cover for one another and tell Sloane.

Pagliuca and Brooks leave a message for Sloane if they need to call in sick. Sloane lets Rogers know, and they plan coverage for the absent worker. If Pagliuca or Brooks become ill while working, they let Rogers know and he sends them to Sloane.

Authority to recommend hiring

Rogers testified that when Pagliuca was hired five or six years ago, Rogers gave him a tour of the building before he was hired.^{3[3]} Sloane asked Rogers what he thought

^{3[3]} The record does not reveal whether Rogers was the only maintenance worker who met with Pagliuca or whether Rogers met with other applicants as well.

of Pagliuca, and Rogers told Sloane that he thought Pagliuca would be good for the job and that he had been recommended by a few people.

When Brooks was hired two years ago, both Rogers and Pagliuca took several applicants, including Brooks, for a tour of the building. They told Brooks what they expected of him if he got the job. Brooks brought pictures of carpentry work he had done in the past, and Rogers and Pagliuca looked it over. Rogers testified that they evaluated both his skills and personality. Rogers and Pagliuca told Sloane what they thought. Rogers told Sloane he thought Brooks would be good for the job.

Rogers testified that Sloane made the decision to hire Pagliuca and Brooks, and that Sloane had the final say. It is not clear from the record whether Sloane interviewed Pagliuca or Brooks himself, although Rogers testified that “we all” sat down and talked to Brooks and the other applicants.

Other authority

Rogers testified that since he became crew chief, neither of the other two maintenance workers has been disciplined, nor has either of them done anything that would warrant discipline. Since he became crew chief, neither employee has filed a grievance or come to him with a complaint. There have been no layoffs or promotions. There is no evidence that Rogers plays any role in evaluating or rewarding employees.

Secondary factors

Rogers receives higher pay because of his status as crew chief, as provided for in the collective-bargaining agreement. Rogers testified that his understanding of his function as crew chief is to be the “senior man.” He knows the building well and the other maintenance workers would turn to him to make decisions if Sloane was out on vacation.

ANALYSIS

Pursuant to Section 2(11) of the Act, the term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. Chicago Metallic Corp.^{4[4]} The status of a supervisor under the Act is determined by an individual’s duties, not by his title or job classification. New Fern Restorium Co.^{5[5]} The burden of proving

^{4[4]} 273 NLRB 1677, 1689 (1985).

^{5[5]} 175 NLRB 871 (1969).

supervisory status rests on the party alleging that such status exists. NLRB v. Kentucky River Community Care^{6[6]} The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. Quadrex Environmental Co.^{7[7]}

As indicated above, the Union asserts that Rogers is a statutory supervisor on the ground that, as crew chief, he assigns work, responsibly directs employees, assigns overtime, and effectively recommends the hire of employees, and on the ground that he is paid a higher wage than the other maintenance employees and is responsible for the work of the department in the absence of the building supervisor.

I conclude, however, that the Union has failed to demonstrate that Rogers possesses Section 2(11) authority. Thus, it does not appear from the record that Rogers assigns work to the other two maintenance employees or responsibly directs them. To the contrary, Sloane makes all the work assignments and Rogers testified that he never changes them. As for the authority to approve overtime work, the record reflects that Rogers generally does not possess such authority. The Union's assertion that Rogers approves overtime work appears to rest on the one instance in which, when he could not reach Sloane, Rogers told the other two employees to stay late to plow snow in light of an imminent storm. Assuming that the employees were paid on an overtime basis for this work, which is not revealed by the record, I find this one instance in which Rogers approved overtime to be too isolated to confer supervisory status.

The Union has failed to prove that Rogers effectively recommended the hire of Pagliuca or Brooks. The Board has consistently applied the principle that authority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. Children's Farm Home.^{8[8]} Where supervisors such as Sloane participate in the interview process, it cannot be said that employees whose status is at issue have authority to effectively recommend hiring. Ryder Truck Rental.^{9[9]} Here, the record does not reveal whether Sloane, who made the final decisions to hire both Pagliuca and Brooks, did so based entirely on the recommendation of Rogers, or whether he interviewed or otherwise investigated the suitability of the candidates himself. I find that, in these circumstances, the Union has failed to meet its burden.^{10[10]}

^{6[6]} 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

^{7[7]} 308 NLRB 101, 102 (1992).

^{8[8]} 324 NLRB 61 (1997).

^{9[9]} 326 NLRB 1386, 1387 fn. 9 (1998).

^{10[10]} I note that in the hire of Brooks, Pagliuca played the identical role as Rogers had played in Pagliuca's hiring, but there is no assertion that Pagliuca is a statutory supervisor.

Finally, the fact that the crew chief is higher paid and is responsible for the department in the absence of the building supervisor are only secondary indicia, which are insufficient by themselves to establish supervisory status, when there is no evidence presented that an individual possesses any one of the several primary Section 2(11) indicia. Ken-Crest Services.^{11[11]}

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All maintenance department employees employed by the Employer at its studios located at 1170 Soldiers Field Road, Boston, Massachusetts;
Excluded: Employees at the Employer's transmitting facilities and all other employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by International Brotherhood of Electrical Workers Local 1228, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate

^{11[11]} 335 NLRB 777, 779 (2001).

with them. Excelsior Underwear, Inc.;^{12[12]} NLRB v. Wyman-Gordon Co.^{13[13]} Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. North Macon Health Care Facility.^{14[14]} In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before June 29, 2005. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by July 6, 2005. You may also file the request for review electronically. Further guidance may be found under E-Gov on the National Labor Relations Board web site: www.nlrb.gov.

/s/ Rosemary Pye

Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 22nd day of June, 2005.

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^{12[12]} 156 NLRB 1236 (1966).

^{13[13]} 394 U.S. 759 (1969).

^{14[14]} 315 NLRB 359 (1994).